UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

CASE NO. 1:07-CR-566

Plaintiff,

:

vs. :

OPINION & ORDER [Resolving Doc. No. 92.]

RANDY S. DELANO

.

Defendant.

:

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Before the Court is Defendant Randy S. Delano's motion for leave to file a delayed notice of appeal. For the reasons below, the Court **DENIES** Defendant Delano's motion.

I. Background

On March 11, 2008, a jury in the Northern District of Ohio found Defendant Delano guilty of one count of possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A) and of one count of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(b)(1)(C). On June 18, 2008, the Court sentenced Delano to 168 months in prison on each count, to be served concurrently. [Doc. 89.] At the conclusion of the sentencing hearing, Delano stated that he desired to appeal his conviction and the suppression issue involved in the case. Sentencing Tr. at 27. The Court then asked Delano's privately-retained trial counsel to file a notice of appeal on behalf of Delano. *Id.* The Court also asked Delano's trial counsel to inform the Court if he would continue to represent Delano on appeal or if the Court would need to appoint appellate

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counsel from the CJA list. Sentencing Tr. at 28. Delano's trial counsel indicated that he would

comply with both of the Court's requests. *Id.*

Delano's trial counsel did not file a notice of appeal from the Court's judgment and sentence.

He also never informed the Court whether he would stay on as Delano's counsel on appeal.

Following appointment of Delano's new (appellate) counsel on January 16, 2009, Delano moved the

Court for leave to file a delayed notice of appeal with the Sixth Circuit on January 20, 2009. [Doc.

92.]

II. Legal Standard & Analysis

The Court denies Defendant Randy S. Delano's motion for leave to file a delayed notice of

appeal because it is untimely under Rule 4(b) of the Federal Rules of Appellate Procedure and in light

of current Sixth Circuit case law.

Rule 4(b) of the Federal Rules of Appellate Procedure, which governs appeals in criminal

cases, states that "[u]pon a finding of excusable neglect or good cause, the district court may – before

or after the time has expired, with or without motion and notice – extend the time to file a notice of

appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by

... Rule 4(b)." Fed. R. App. P. 4(b)(4) (emphasis added). Under Rule 4(b)(1)(A)(i)-(ii), in a

criminal case, "a defendant's notice of appeal must be filed in the district court within 10 days after

the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the

government's notice of appeal."

The Sixth Circuit has held that district courts have "no power to extend the [notice of appeal]

filing period beyond the time limit prescribed by [Rule 4(b)] The failure to take any action

whatever within 40 [(10 plus 30)] days of the entry of the judgment is invariably fatal." *United States*

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v. Hove, 548 F.2d 1271, 1273 (6th Cir.1977) (per curiam). Further, the Sixth Circuit has concluded

that "[c]ompliance with Fed. R. App. P. 4(b) is a mandatory, jurisdictional prerequisite which [the]

court can neither waive nor extend." <u>United States v. Hatfield</u>, 815 F.2d 1068, 1073 (6th Cir.1987).

In cases where a defendant demonstrates a desire to appeal from his judgement and sentence

and his counsel fails to pursue such an appeal (at all or in a timely manner), the defendant's proper

remedy is to file a "[28 U.S.C.] § 2255 motion for habeas relief in the district court [because]

Is luch failure by counsel constitutes per se ineffective assistance under the Sixth Amendment and

entitles the defendant to habeas relief under § 2255. In such a case, the relief available to the

defendant is a delayed direct appeal." *United States v. Leachman*, 309 F.3d 377, 380 (6th Cir. 2002);

see also Ludwig v. United States, 162 F.3d 456, 458-59 (6th Cir. 1998); Rosinski v. United States, 459

F.2d 59, 59-60 (6th Cir.1972) (per curiam).

Thus, the Court finds that even if it granted Defendant Delano a 30 day extension, as

permitted by Rule 4(b), Delano still would have had to file a notice of appeal on or before August 4,

2008 in order for the notice of appeal to be considered timely. Since Delano's current notice of

appeal comes more than five months after this date and the Court cannot waive or extend the notice

of appeal filing period beyond the time prescribed in Rule 4(b), the Court denies Delano's motion for

leave to file a delayed notice of appeal.

I. Conclusion

For the abovementioned reasons, the Court **DENIES** Defendant Randy S. Delano's motion

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for leave to file a delayed notice of appeal.

IT IS SO ORDERED.

Dated: January 30, 2009 s/ James S. Gwin

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE